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In the Supreme Court of the United States

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC. ("MACMA"),

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF APPELLEE MACMA ON THE MERITS

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STATEMENT OF THE CASE

Appellants' constitutional attack on the Michigan Agricultural Marketing and Bargaining Act (hereinafter "Michigan Act" or "AMABA") began in 1974. In its 1976 Opinion the Michigan Supreme Court concluded that it would be imprudent to resolve the constitutionality of the Michigan Act where further factual development concerning the problems sought to be remedied by that Act would substantially contribute to the proper disposition of the case. J.S. App. A46. Consequently, an 11-day trial was held, after which the Circuit Court found the Michigan statute constitutional on all grounds, including federal preemption. In affirming that decision the Michigan Supreme Court carefully considered Appellants' preemption claim before rejecting it.

The Michigan Supreme Court concluded that the Federal Agricultural Fair Practices Act of 1967 (hereinafter "Federal Act" or "FAFPA") and the Michigan Act "seek to accomplish the same *general* purpose: to permit producers (farmers) to associate together in a marketing cooperative to enable them to improve their marketing and bargaining position when dealing with food handlers (processors)". J.S. App. A5. After describing the exclusive representation provisions contained in the Michigan Act the Michigan Supreme Court concluded that no provision in the Federal Act was meant to affirmatively *create* or *protect* rights of private dealing between individual producers and processors. The Michigan Supreme Court explained that the Federal Act sought to improve the bargaining position of individual producers by protecting them from handler coercion in their choice to join a cooperative marketing association.

While aware that the Federal Act's definition of "handler," unlike the Michigan Act's definition, included a producer association, and while not equating association financial support with formal association membership, the Michigan Supreme Court held that even if the Michigan Act were read as requiring a producer to join an association, that would not violate the Federal Act because it proscribes handler coercion, not state action. J.S. App. A10.

The Michigan Supreme Court found no basis for Appellants' claim that the Michigan Act stands as an obstacle to the accomplishment and execution of the full purposes of Congress. The Court concluded that the challenged aspects of the Michigan Act constituted "a step by the Michigan Legislature into a previously unregulated area; a step which furthers both the goals of FAFPA and others not prevented by FAFPA by taking an active role in enhancing the bargaining position of producers, protecting not only individuals, but also their associations from internal and external pressures." J.S. App. A14.

SUMMARY OF ARGUMENT

None of the three challenged aspects of the Michigan Act (the duty to bargain provision, the exclusive representation principle, and the service fee requirement) is preempted by the Federal Act. The Federal Act contains no explicit statement of preemptive intent, and Appellants concede that Congress did not intend to occupy the field of agricultural regulation, in which the states have historically enjoyed broad regulatory power.

The Federal Act states that it is not to be construed to change or modify existing state law. That provision is

important because the California statute which this Court upheld in *Parker v. Brown*, 317 U.S. 341 (1943), remained in effect at the time the Federal Act became law. Because that California statute contains aspects of compulsion comparable to those challenged in the Michigan Act it is apparent that Congress, rather than impliedly preempting the Michigan Act, explicitly declared that such a statute was not affected.

Since both the Federal and Michigan Acts protect a producer's right not to join an association of producers there is no conflict between the statutes on this point. Under the Michigan Act all bargaining unit producers pay their fair share of the costs of the bargaining association which represents them. Appellants contend that such a provision necessarily coerces a non-association producer to join the association. That contention is not supported by the authority upon which Appellants rely, and is inconsistent with the frequent recognition by state legislatures of a meaningful difference between compulsory membership in, and compulsory financial support of, a bargaining association.

Should this Court nevertheless conclude that the Michigan Act's exclusive representation and service fee provision automatically coerces producers to join or contract with producer associations, that coercion would not constitute the private handler action proscribed by the Federal Act. Rather, that challenged conduct, because it is both compelled and enforced by state action, is beyond the reach of the Federal Act.

In passing the Federal Act Congress' predominant purpose was to outlaw processor discrimination against those producers who attempted to organize for collective strength in their dealings with processors. The Federal Act was

moderate in scope and was never intended to *require* collective bargaining between processors and producer associations. Nevertheless, processor lobbyists feared that the Federal Act might be interpreted as a Wagner Act for agriculture and it was only because of those fears that Congress inserted a disclaimer section stating that the Act itself did not require such bargaining. Congress did not, however, affirmatively create or protect a processor right to ignore producer associations. To conclude otherwise, as Appellants have done, makes a mockery of the Federal Act by transforming it from a farmer's shield against discriminatory processors into a processor's sword to be used to destroy the collective action by farmers which Congress has historically fostered.

ARGUMENT

I. The Deferential Treatment Which This Court Has Accorded State Regulation of Agriculture Undercuts Appellants' Claim of Implied Preemption.

Appellants' preemption claim is exceedingly narrow because several branches of preemption analysis are clearly inapplicable. Appellants concede that the Federal Act has not "occupied the field" of agricultural marketing and bargaining. That conclusion is made abundantly clear by the second paragraph of 7 U.S.C. § 2305(d), which provides that "The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction."

It has long been recognized that a state law is preempted to the extent that it conflicts with a federal law. Such a conflict may arise when compliance with both federal and state regulations is a physical impossibility, or

where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In the present case no such conflict exists. The Federal Act contains no explicit preemptive language, nor have Appellants pointed to any language therein which prohibits, in terms, any aspect of the regulation imposed by the Michigan Act. Indeed, Appellants' central argument is that the Michigan Act destroys the Federal Act's protection of an individual farmer's right not to join a cooperative, yet the Michigan Act itself explicitly recognizes that right. Mich. Comp. Laws § 290.704(1)(a). Consequently, this case is readily distinguishable from the kind of preemption case in which the federal intention to preempt is explicit, such as was the case in the first preemption case Appellants cite, *Fidelity Federal Savings and Loan Association v. de la Cuesta,* 458 U.S. 141 (1982), wherein the federal due-on-sale regulation explicitly provided, in relevant part, that "federal associations shall not be bound by or subject to any conflicting state law which imposes different . . . due-on-sale requirements." In stark contrast, nothing in the Federal Act declares that a state law is preempted merely because it is "different" from the Federal Act. On the contrary, the above-referenced language in 7 U.S.C. § 2305(d) plainly reveals the absence of a broad Congressional intent to preempt.

What standard, then, must Appellants satisfy in order to establish "implied" preemption? In *Kelly v. Washington,* 302 U.S. 1 (1937), this Court stated: "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." (Citations omitted).

Appellants have failed to make any effort to reconcile the Federal and Michigan Acts, whose purposes are the same (albeit the Michigan Act regulates more extensively), and they have also failed to recognize that the stringent preemption standard just discussed is particularly appropriate in the field of agriculture since this Court has recognized that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963).

Appellants assert that the Michigan Act differs from the objectives of Congress as expressed in the Federal Act, and that is is physically impossible to comply with both acts. *Paul, supra*, teaches that the first of those two assertions (even if true, a proposition we deny) is invalid since the difference "poses, rather than disposes of the problem before us" and the test "is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." 373 U.S. at 141-142.

As to Appellants' second assertion, *Paul* reveals the error in the effort of Appellants, and the amici supporting them, to use Congressional hearing testimony (including that offered by food processors opposed to the proposed Federal Act) to demonstrate the impossibility of physical compliance with both statutes. Thus, *Paul* observed that "a holding of federal exclusion of state law is inescapable and *requires no inquiry into Congressional design* where compliance with both federal and state regulations is a physical impossibility . . . ." 373 U.S. at 142-43 (emphasis added). If Appellants were correct in their assertion that it is physically impossible to comply with both statutes, that would be discernible from a reading of the two statutes.

Because of the above-noted absence of any claim (or basis for a claim) that Congress meant, in the Federal Act, to completely occupy the field of agricultural marketing and bargaining, much of the additional inquiry undertaken in *Paul*, i.e., whether Congress had (even absent a plain conflict between the two statutes there considered) ordained that the state regulation shall yield, is not pertinent herein.

On the other hand, it appears that the four justices who dissented in *Paul* saw the challenged California law as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress because of the comprehensive and pervasive scheme of the federal law there considered, as contrasted with the extremely limited regulation expressed in the Federal Act at issue herein. Thus Justice White observed in dissent:

> We would hesitate to strike down the California statute if the state regulation touched a phase of the subject matter not reached by the federal law and a claim were nevertheless made that such complementary state regulation is preempted, compare *Campbell v. Hussey*, 368 U.S. 297, with *Savage v. Jones*, 225 U.S. 501. But here the Secretary has promulgated a comprehensive and pervasive regulatory scheme for determining the quality and maturity of Florida avocados, ... 373 U.S. at 166.

Justice White went on to note that such pervasive regulation contrasted with that in *Parker v. Brown*, 317 U.S. 341 (1943), in which "the federal agricultural regulatory scheme was partial and incomplete" and the state statute was therefore not preempted. 373 U.S. at 168.

We submit that because the Federal Act's regulation is even more limited and incomplete than that of the

Agricultural Marketing Agreement Act discussed in *Parker*, it follows that the Michigan Act cannot be preempted on the ground of "pervasive federal regulation" as discussed in the *Paul* dissent.

II. There Is No Preemption Because the Federal Act Does Not Affect "Existing State Law," and a California Statute Containing Aspects of Compulsion Analogous to Those Challenged in the Michigan Act Was "Existing" in 1968.

The California Agricultural Prorate Act upheld as not preempted in *Parker* continues in effect today in essentially unchanged form (though bearing a different title) and was also in effect in 1968. As such it was "existing State law" which the Congress in the Federal Act expressly declined to "change or modify." 7 U.S.C. § 2304(d).

If that California statute, manifestly not preempted by the Federal Act, contains elements similar to those "compulsory" aspects of the Michigan Act challenged by Appellants herein, then it cannot reasonably be argued that Congress meant to deprive Michigan of its inherent right to utilize similar compulsion in its effort to remedy a serious problem facing Michigan farmers. Appellants' contrary argument gives far too little weight to the delicate issues of federalism implicated by any "implied" preemption case. As this Court observed in *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952), the exercise of federal supremacy is not lightly to be presumed.

The California Agricultural Prorate Act was passed in 1933 and, as in the instant case, its constitutionality under the state and federal constitutions had been upheld by the California Supreme Court prior to this Court's consideration of the case. 317 U.S. at 344 n.1. The same general statute remained on the books 35 years later when

Congress passed the Federal Act in 1968 and it remains in effect today.[1] That statute declares the California public policy "to aid agricultural producers in preventing or correcting adverse marketing conditions . . . [and] developing more orderly or efficient or equitable methods in the marketing of commodities and thereby to aid agricultural producers to achieve and maintain a purchasing power at an equitable and reasonable level".[2]

To carry out that policy the California statute authorizes a system of establishing marketing programs which, when implemented, are binding even upon those producers who might prefer not to be compelled to market their produce through such a marketing program. While the Solicitor General has suggested that such a marketing program is distinguishable from the Michigan Act's regulation on the ground that the former involves "direct state control of prices" (Solicitor General Br. 9 n.4), that suggestion does not withstand analysis because an essential aspect of both the California and Michigan statutes is the necessity for private producer initiative of, and

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1. That statute, Cal. Food & Agric. Code §§ 59301-60015 (1967), is now entitled The Agricultural Producers Marketing Law.

We recognize that in addition to state marketing laws there are also federal marketing orders pursuant to federal law. While it might be argued that the existence of such federal marketing regulation somehow minimizes the significance of Congress' declaration that such existing state marketing (and other) laws were unaffected by the 1968 passage of the Federal Fair Practices Act, such an argument misses the point. The compulsory aspects of the California marketing law could not logically have been unaffected by the Federal Fair Practices Act if, as Appellants have argued, Congress meant in that Act to assure that each farmer would enjoy the absolute right to decide to whom, and at what price, he would dispose of his raw product. Nothing in the language or history of the Federal Fair Practices Act suggests that a state's right to regulate argricultural bargaining relationships is dependent on the existence of parallel federal bargaining legislation.

2. *Id.* §§ 59541-59542.

majority producer support for, the collective marketing and/or bargaining.

State compulsion is not absent merely because private parties play an essential role in proposing and approving mandatory state action. As the Court noted in *United States v. Southern Motor Carriers Rate Conference*, 702 F.2d 532, 536 n.6 (5th Cir. 1983): "In *Parker* and *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1979), the Supreme Court made it clear that an action may be compelled by the state even though private parties petitioned the state to consider requiring such [mandatory state] action."

Exclusive agency bargaining under the Michigan Act can occur only after producers themselves seek the establishment of a bargaining unit (to be established, if at all, after a hearing and in accordance with state-mandated procedural and substantive standards) and after a majority of affected producers (producing a majority of the relevant commodity) elects to market their produce through the collective strength of a single bargainer. Mich. Comp. Laws §§ 290.706-707. Similarly, under the California statute a marketing program binding on all producers in the proration zone (analogous to a Michigan bargaining unit) can be implemented only after private producers (not the state) petition for the establishment of such a zone and marketing program, and only after a majority of producers assents to the marketing program.[3]

Under the California statute a state official appoints the individual producers who comprise the marketing program committee, but such appointments must come from nominations made by the producers themselves.[4]

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3. *Id.* §§ 59641-59655, 59855.

4. *Id.* §§ 59721-59723.

Just as the Michigan Act provides a mechanism by which affected producers may terminate the exclusive agency bargaining[5] the California Act also provides a mechanism by which producers can terminate the marketing program which, unless terminated, is binding even on the "unwilling" producers.[6]

Under the California Act a marketing program committee may be empowered to receive from all producers in the proration zone portions of such producers' commodity, to be delivered into a stabilization or surplus pool. Significantly, that marketing program committee can both affix "servicing charges to be assessed against the total quantity of any commodity which is received into the pools" and also market the contents of the stabilization pool at whatever price it deems advisable "consistent with the maintenance of stabilized marketing conditions."[7]

In each of these respects it appears that the California statute, "existing" in 1968, is essentially the same as the statute this Court found not preempted in *Parker*, 317 U.S. at 346-349. Moreover, the challenged aspects of the Michigan Act are fundamentally the same, at least for purposes of preemption analysis, as those in the California statute. Nothing in the California statute would prevent the members of a cooperative association from constituting the producer majority necessary to establish a marketing program. Indeed, where so authorized in writing by its members a cooperative association can assent on their behalf to a proposed marketing program.[8]

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5. Mich. Comp. Laws § 290.712.
6. Cal. Food & Agric. Code §§ 59301-60015 (1967).
7. *Id.* § 59806.
8. *Id.* § 59852.

Under the California statute even non-assenting producers are bound by the marketing program committee's judgment as to the "correct" price to be received for the marketed commodity. In one sense the California statutory system is even more "compulsory" than the practice under the Michigan Act since typically the association accredited under the latter statute has negotiated a base price only, and Michigan producers, whether or not MACMA members, normally choose the processors with whom they will negotiate, individually, the price (above the association negotiated minimum) and terms mutually acceptable to them and their processors. See reporter's trial transcript (hereinafter "RT") 88-89.

Finally, the California statute contemplates that all producers in a proration zone will be assessed service charges or fees proportional to their volume of production,[9] a concept obviously grounded upon the same fair-share concept which underlies the Michigan Act's service fee requirement. Mich. Comp. Laws § 290.710(1). The voluntary members of a particular California cooperative might control a marketing program committee, but such committee's assessment of charges or fees upon all producers who benefit would not contravene the Federal Act's protection, in 7 U.S.C. § 2303(a), of a non-assenting producer's right not to join an association. Again, this is so because 7 U.S.C. § 2305(d) states that no provision of that Act is to be "construed to change or modify existing State law."

Parker left no doubt as to the compulsory nature of the California regulatory scheme since this Court there observed that it was a misdemeanor "for any producer to sell . . . without proper authority any commodity for

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9. *Id.* §§ 59813-59818.

which a proration program has been instituted." 317 U.S. at 347. Just as 7 U.S.C. § 2305(d) contemplates continued state regulation of agricultural marketing and bargaining, this Court found in *Parker* that the Agricultural Marketing Agreement Act contemplated continued state regulation not inconsistent with the Federal Act. 317 U.S. at 354.

After noting in *Parker* that "[t]he only suggested possibility of conflict is between the declared purposes of the two Acts," this Court found significant the federal Agriculture Secretary's belief "that the state will tend to effectuate the policies of the federal act", as evidenced by the Secretary's approval of the state program reflected by a loan agreement between the state and the Commodity Credit Corporation. 317 U.S. at 358. Similarly, in the present case the Administrator of the Farmer Cooperative Service of the U.S. Department of Agriculture ("USDA") established the lack of any conflict between the two Acts. He explained that prior to his trial testimony he sent a copy of the Appellants' September 6, 1977 trial brief (which raises the same federal preemption arguments presently asserted to this Court) for review and study by the office of General Counsel in the USDA. He further testified that as a result of that study he was informed that the Department was "very unlikely" to seek to prevent the operation of the Michigan Act and that there was "no appearance of conflict between [the state and federal] statutes". Jt. App. 8-11.

Because 7 U.S.C. § 2305(b) places substantial authority for enforcing the Federal Act in the USDA, such testimony, supplemented by the fact that neither that Department nor anyone else has ever pursued any claim that a Michigan association's bargaining pursuant to the Michigan Act automatically violates the Federal Act, demonstrates an inherent weakness in Appellants' preemption claim.

Even if this Court rejects our comparison between the Michigan Act and the 1967 California statute expressly unchanged by the Federal Act, a careful review of Appellants' specific preemption claims demonstrates that they are fatally flawed.

III. Both the Federal Act and the Michigan Act Protect Against Handler Coercion Concerning a Farmer's Right Not to Join an Association.

Section 2303(a) of the Federal Act makes it unlawful for a handler "To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, . . ." Likewise, the Michigan Act makes it unlawful for a handler to "coerce a producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association. . . ." Mich. Comp. Laws § 290.704(1)(a). The Federal Act, but not the Michigan Act, defines the term "handler" so as to include an association. The fact remains, however, that both statutes clearly protect a farmer's right to join or refrain from joining a producer association. Notwithstanding both statutes' protection of this right, Appellants argue that the service fee and exclusive representation features of the Michigan Act "completely destroy" the farmer's federal right not to join an association. They assert that because under the Michigan Act even non-association farmers, when dealing individually with handlers, (1) are bound by the terms negotiated by the accredited association and the handler, and (2) must pay a service fee to such association, then such farmers are somehow being unlawfully coerced by the association to join the association. That assertion is based upon Appellants' dual contentions that there is no meaningful distinction (in the somewhat analogous field of

labor law) between an agency shop and a union shop, and that a state action analysis cannot save the Michigan Act from the asserted violation of the Federal Act's protection against coercion of a farmer's right not to join. The Michigan Supreme Court correctly rejected both of those contentions.

At the outset it should be noted that if Appellants were correct in asserting that a service fee requirement in an exclusive representation system automatically violates a statutory protection of an individual's right not to join an association, then it would follow that the Michigan Act itself suffers from a major internal inconsistency. That is, if the Michigan Act's majority rule principle means that non-association farmers will necessarily be coerced into joining associations such as MACMA, then it follows that whenever an association is accredited pursuant to the Michigan Act a violation of that same Act's protection of a farmer's right to refrain from joining will automatically occur. Mich. Comp. Laws §§ 290.704(1)(a), .710(1).

Fundamental principles of statutory interpretation require that a statute be read as a whole, and that the interpretation to be given to one section arrived at only after due consideration of every other section so as to produce, if possible, a harmonious and consistent statute. Similarly, where a statute is arguably subject to conflicting interpretations, one which would result in the Act being held unconstitutional and the other permitting a finding that it is constitutionally sound, the latter alternative should be accepted. *See, e.g., Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495, 500 n.10 (1947).

If a statutory service fee requirement imposed on non-association bargaining unit members automatically violated an individual's statutory right not to join an asso-

ciation, there would be no point in a legislature's writing both provisions into the same statute since the service fee requirement would obviously be invalid. Legislatures do write both types of provisions in a single statute, however, and courts do not, on review of such statutes, strike them down as internally inconsistent.

In *Knight v. Minnesota Community College Faculty Association*, 51 U.S.L.W. 3703 (Mar. 29, 1983), this Court summarily affirmed that aspect of a three judge federal court decision which upheld the service fee requirement (challenged as unconstitutional) in such a statute. This Court has not infrequently avoided the adjudication of constitutional issues where such avoidance could be accomplished by giving a statute a narrowing construction. See, e.g., *International Association of Machinists v. Street*, 367 U.S. 740 (1961). That familiar approach, however, seems inappropriate where it requires a court to treat as identical two concepts which a legislature clearly considered different.

In this regard it is significant that, in deciding the *Knight* case, the three judge federal court expressly recognized that the challenged Minnesota statute specifically protected an individual's right not to join a bargaining association even though that individual was required to financially support that association in the same manner as the analogous bargaining unit member under the Michigan Act. In its findings of fact in *Knight* the court observed, in its discussion of the structure of the statute challenged, that "public employees under PELRA have a right not to join any labor organization which may be certified as their exclusive representative, but a 'fair share fee' may be deducted from nonmembers and paid to the representative. Minn. Stat. § 179.65, Subd. 2." 111 LRRM 3156, 3164 (Minn. 3 Judge DC 1983).

We cite *Knight* not for its holding but rather because of the recognition, implicit in the challenged statute, that a meaningful right not to join a union is not inconsistent with a state-approved requirement that those who benefit must share the cost of collective bargaining. The latter requirement does not coerce one to give up the former right. Other statutes similarly authorize a requirement that an individual financially support a bargaining association even though that individual may not be required to join that association.[10] In view of the recognition that such provisions are not inherently in conflict it would seem that Appellants, in order to meet their heavy burden of proving implied federal preemption, must demonstrate compelling authority in support of their position. Instead, they rely on (1) a misreading of this Court's decision in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and (2) the false premise that an agency shop is necessarily invalid unless it is expressly authorized by federal law.

Appellants and the Solicitor General rely on that portion of the *General Motors* case which observed, in a very limited context, that an individual's position in an agency shop is "the practical equivalent of union 'membership' ". 373 U.S. at 743.

The first point to recognize about the *General Motors* case is that it presented this Court with a justiciable controversy *only* because the State of Indiana had judicially determined (in *Meade Electric Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959)) that an agency shop clause

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10. See, e.g., Conn. Gen. Stat. § 5-280(a) (1975) as amended; Haw. Rev. Stat. § 89.4(a) (1976) as amended; Mont. Code Ann. § 39-31-401(3) (1983); Ohio Rev. Code § 4117.09(c) (effective 1984); Or. Rev. Stat. § 243.650(10) (1981); R.I. Gen. Laws ch 178 § 36-11-2 (1958) (as amended); Vt. Stat. Ann. Tit. 21, § 1722(1) (1978).

did *not* violate that state's right-to-work law.[11] Such a determination was *not* upset by this Court but rather provided the reason why this Court was called upon to decide whether the Taft-Hartley amendments to the Wagner Act permitted the negotiation of *agency* shop agreements even though the pertinent provision of such amendments authorized union-employer agreements compelling union "*membership* as a condition of employment. The Court answered that question affirmatively.

While Appellants argue that "agency shops have been allowed in the labor law context because such arrangements are *specifically authorized* by federal law" (Brief of Appellants 24) they immediately follow that assertion by quoting the Wagner Act's authorization of an agreement requiring *membership* (not mere financial support by nonmembers) in a labor organization as a condition of employment. In *General Motors* this Court explained that the "prevailing administrative and judicial view under the Wagner Act was or came to be that the proviso to § 8(3) covered both the closed and union shop, as well as less onerous union-security arrangements if they were otherwise legal." 373 U.S. at 739.

In discussing the enactment of the Taft-Hartley Act this Court described Congress' addition of certain language to the original Wagner Act proviso to § 8(3) and explained that such language accomplished the "twin purposes" of eliminating, through the abolition of the closed shop, "the most serious abuses of compulsory unionism," while at the same time recognizing that in the absence of a union

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11. The Indiana law declared the state's policy, in relevant part, "that membership or nonmembership in a labor organization should not be made a condition to the right to work or to become an employee of or to continue in the employment of any employer." 129 Ind. App. 631, 159 N.E.2d at 411.

security provision many employees who benefit from union-achieved benefits would refuse to pay their share of the cost of same. 373 U.S. at 740.

By reading the Wagner Act and Taft-Hartley Act provisos, which expressly authorize a requirement of union *membership*, as also implicitly authorizing the less burdensome *agency* shop this Court did not equate these different union security devices for all purposes. Rather, this Court reasoned that if Congress was willing to tolerate the more onerous requirement of actual union membership it was also willing to tolerate the less onerous requirement of union financial support without a formal membership requirement. This Court stated that the "difference between the union and agency shop may be of great importance in some contexts, but for present purposes it is more formal than real. To the extent that it has any significance at all it serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent." 373 U.S. at 744.

In addition, nothing in *General Motors* supports Appellants' belief that an agency shop is inherently invalid absent specific federal statutory approval. In discussing the Wagner Act proviso to § 8(3)'s rule, which "forbade employers to discriminate against employees to join a union," this Court explained that the proviso (which permitted negotiated agreements compelling union membership) was added not because of Congress' certainty that a membership requirement would automatically constitute such forbidden discrimination but rather because it was merely "feared" that absent the proviso the anti-discrimination provision "*might* be held to outlaw union-security arrangements such as the closed shop, see 79 Cong. Rec.

7570 (Statement of Senator Wagner), . . ." 373 U.S. at 738-39 (emphasis added).

The proviso was not viewed as critical to the survival of union security agreements. Rather, as explained by the House Committee on Labor, it was added to avoid potential disagreement: "All that it does is to eliminate the doubts and misconstructions in regard to the effects of section 7(a) upon closed-union agreements, ..." H.R. Rep. 1147, 74th Cong., 1st Sess. 19 (1935).

This Court has observed that the union and agency shop are not identical and that the difference between them "may be of great importance in some contexts." *Abood v. Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977), quoting *General Motors*, 373 U.S. at 744. In *Abood* this Court explicitly recognized that a union shop arrangement imposes a requirement over and above that imposed by an agency shop agreement, i.e., the "additional requirement that each employee formally join the union," a requirement which this Court did not have to consider in that case.

The Michigan Supreme Court agreed with Appellees that there is a "meaningful distinction between being required to *join* an association and merely being required to support and be represented by an association as required by AMABA." J.S. App. A10 n.13. Nothing in the Federal Act purports to outlaw a state's regulation, serving the same general purpose as the Federal Act, merely because the state provides additional tools to make the prohibition of processor discrimination against association membership meaningful. Accordingly, in this context the requirement of association financial support does not constitute association coercion in violation of a producer's right not to join an association.

After recognizing that the Michigan Act does not compel producers to actually become members of an accredited association, the Solicitor General suggests that this does not save the Michigan Act since, in any event, 7 U.S.C. § 2303(c) prohibits an association (because included within the definition of federal handler) from coercing or intimidating any producer to enter into a membership or marketing contract with an association of producers. Solicitor General Br. 21-22. Yet nothing in the Michigan Act's exclusive representation provision requires a non-association producer to enter into a membership agreement or marketing contract with the accredited association. Rather it is only by operation of law, not by *contract*, that the accredited association becomes the non-association producer's bargaining representative with respect to those terms over which the association chooses to negotiate on behalf of all bargaining unit members. Moreover, associations by themselves cannot seek accreditation under the Michigan Act because no association can *compel* the membership of a majority of bargaining unit members. On the contrary, it is only by combining the numerous individual decisions of a majority of farmers, who have entered into marketing and bargaining contracts with a single association, that such an association is authorized to apply for accreditation. Mich. Comp. Laws §§ 290.706-707. In this sense the Michigan Act's exclusive representation principle cannot be implemented by mere association desire but rather only as a result of the voluntary decisions of a majority of individual farmers. Even if such a democratic system could fairly be characterized as coercive, a proposition we reject, it does not constitute handler (in this case, association) coercion and is therefore beyond the reach of the Federal Act.

IV. The Michigan Act Is Valid Because the Challenged Conduct Is Compelled and Enforced by State Action Rather Than by the Private Handler Action Proscribed by the Federal Act.

Should this Court find that the Michigan Act's provision for exclusive representation and a service fee automatically coerces producers to join or contract with producer associations, such coercion would be coercion by the state, not the coercion by *handlers* prohibited by 7 U.S.C. §§ 2303(a) and (c). Such was the holding of the Michigan Supreme Court. J.S. App. A10.

Appellants and the amici supporting them attempt to overcome that holding by offering distinctions between the instant case and the state action doctrine developed in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. The offered distinctions fail and, as we discussed above, *Parker's* facts demonstrate that the state agriculture statute unsuccessfully challenged in that case was far more comparable to the Michigan Act than to the numerous other factual settings in which *Parker* has been applied. Because most *Parker* applications occur in the antitrust area that case is generally viewed only in terms of antitrust immunity. However, a careful reading of *Parker* reveals that it applied fundamental preemption principles that also apply herein. Thus this Court observed that "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 350.

Notwithstanding the breadth of the language in the Sherman Act this Court, in *Parker*, found "no hint that it was intended to restrain state action or official action

directed by a state." 317 U.S. at 351. The instant case is even more compelling than *Parker* on this point since 7 U.S.C. § 2303(a) prohibits only *handler* coercion in the exercise of an individual's right to join or not join a producer association. In *Parker*, as in the instant case, the state statute was not enacted as an unreasonable price-fixing scheme for producers. Rather, as this Court noted in *Parker*, the California statute required a showing that the particular marketing plan "will prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profit to producers." 317 U.S. at 346.

Appellants ignore the striking factual similarity between the state economic regulation involved in the Michigan Act and in the California statute upheld in *Parker*. They quickly turn their attention from *Parker's* own facts to the more recent application of the *Parker* doctrine in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). After stating *Midcal's* two-step test for defining protected state action they *assume* "that the majority rule provisions of the Michigan Act reflect an articulated state policy," thus satisfying the first step, but they assert "that the policy is not supervised by the state in any way" and therefore conclude that the Michigan Act fails to satisfy the requisite second step. Brief of Appellants 28.

It is clear that the Michigan Act's exclusive representation system, including its service fee requirement, is mandated any time an association is accredited and thus could not be more clearly articulated and affirmatively expressed in state policy. Mich. Comp. Laws § 290.710(1). It is also clear that the State of Michigan actively supervises the enforcement of these exclusive representation and service fee provisions. The Michigan Act makes it an

unfair practice for a Michigan handler "to conspire, combine, agree or arrange with another person to do or aid or abet the doing of any practice which is in violation of this act." Mich. Comp. Laws § 290.704(1)(f). Accordingly, when a handler failed to pay certain producers at least the negotiated minimum price for their apples, the association filed unfair practice charges against that handler. Following a formal administrative hearing before Appellee Michigan Agricultural Marketing and Bargaining Board that Board issued an appropriate order requiring the handler to pay the affected producers the minimum price negotiated by the association and to pay the association the service fees to which it was entitled. *See* RT 251-252, 259-261.

In view of the foregoing the Michigan Supreme Court correctly held that any possible coercion (which coercion that Court did not find) is state action rather than the handler coercion proscribed in 7 U.S.C. §§ 2303(a) and (c). J.S. App. A10 and n.13. Accordingly there is no preemption.

Appellants rely on *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), in support of their attempt to avoid the immunity from preemption created by *Parker v. Brown*. In the Michigan Supreme Court Appellants attempted to rely on a similar Michigan decision, *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W.2d 268 (1952), which held that the application of state fair trade legislation to non-signers was unconstitutional.

The Michigan Supreme Court found Appellants' reliance on *Shakespeare* flawed by their false premise that the Michigan Act was directed toward achieving price security for producers at the expense of the operation of

a healthy free market. J.S. App. A20-21. The Michigan Supreme Court correctly concluded that the Michigan Act:

> was not directed toward achieving price security for producers at the expense of the operation of a free market, but was, instead, only intended to overcome an artificial obstacle to the operation of supply and demand forces, *viz.*, the fortuitous position of handlers of perishable agricultural products in the chain of marketing such commodities which permitted handlers to distort free market forces by demanding prices not wholly reflective of supply and demand. J.S. App. A21.

Appellants' comparison of the Michigan Act's regulation with that of the fair trade laws struck down by *Schwegmann* and *Shakespeare* ignores striking differences between the two statutory systems. The fair trade laws could authorize a *single* retail signer to bind all non-signer retailers, against their will, to the signer's agreement with the manufacturer not to sell the designated product below the minimum price agreed to. In contrast, neither the Michigan Act nor the California statute upheld in *Parker v. Brown* authorizes the binding of non-assenting producers unless a *majority* of affected producers initiates the regulation and unless the state specifically approves, by reference to statutory standards, the segment of the agricultural economy ("proration zones" in California, "bargaining units" in Michigan) so regulated.

Rather than discouraging competition, by allowing a single signer to bind far more numerous non-signers, as did the state fair trade laws, the Michigan Act was intended to correct a disparity of bargaining power so that meaningful, competitive negotiations could occur.

The Solicitor General also analogizes to *Schwegmann* and says that the present case poses the question "whether

the private conduct demanded by the Michigan Act is forbidden by the AFPA, rather than by the Sherman Act." Solicitor General Br. 19-20. In arguing that one of the reasons the Federal Act protected voluntary association membership was to avoid frustrating the policies of the Sherman Act, the Solicitor General cites Note, *Trust Busting Down on the Farm: Narrowing the Scope of the Antitrust Exemptions for Agricultural Cooperatives*, 61 Va. L. Rev. 341 (1975). A review of that note reveals that notwithstanding its author's general view that agricultural cooperatives enjoy overbroad protection from the antitrust laws, the author recognized that a major problem faced farmers who must sell to powerful food processors:

> One major problem farmers faced in 1922 which remains equally serious today is concentration in the market for their products. Capper-Volstead's authorization of collective processing and marketing was an attempt to counter the bargaining power of oligopsonist buyers, but the bargaining power gap is as wide today as it was fifty years ago. *Id.* at 364.

After explaining that deconcentration of the food processing industry was not, as of 1975, "on the horizon" the author explained:

> Congress attempted relief with the passage of the Agricultural Fair Practices Act of 1967. This legislation forbids to large buyers certain practices designed to impair the producer's right to market his products through a cooperative, such as economic coercion and price discrimination. The Act also prohibits buyers from inducing farmers to cease or to refuse to belong to a cooperative by offering them valuable consideration.

> The Fair Practices Act was designed to prevent concentrated buyers from using their economic leverage to destroy collective marketing. But because the Act does not prohibit 'normal' good faith commercial intercourse between producers—independent or otherwise—and buyers, the cooperatives are handicapped in forming a united front against concentrated buyers. *Id.* at 366.

In a footnote at the end of the quoted text the author explained that "problems of proof [in attempting to enforce the Federal Act] are severe," noting that, of twenty actions brought under that Act, "Sixteen had been dismissed for lack of evidence or failure to state a claim. Three have been settled and one is in litigation." *Id.*

In passing the challenged Act the Michigan Legislature was apparently aware that the proof problems encountered under the Federal Act tended to frustrate its purpose of preventing concentrated buyers from using their economic leverage to destroy collective bargaining. The Michigan Supreme Court carefully considered the voluminous trial court record established to demonstrate the purpose and effect of the challenged statute and concluded that the Michigan Legislature's innovative solution[12] to a serious Michigan problem was valid. In rejecting the Appellants' argument that the Michigan Act went "too far" the Michigan Supreme Court noted various ways in which the Michigan Legislature, in an area beyond the Federal Act's regulation, could have correctly con-

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12. The Michigan Act is similar in key respects to the proposal suggested in Note, *Establishing Bargaining Units in Agricultural Marketing*, 68 Va. L. Rev. 1298 (1982), whose author contended that "Some innovation is clearly required to equalize the parties' bargaining power without vitiating the competitive forces." *Id.* at 1302.

cluded that the Michigan Act's challenged features were essential to serve the purposes shared by both statutes.

The Michigan Supreme Court found ample support in the record for the trial court's factual findings which "establish a disparity in bargaining power resulting in disruption of the orderly marketing of perishable agricultural commodities and the imposition of inequitable economic pressure upon independent producers." J.S. App. 822. Among those specific factual findings concerning the conditions which existed in Michigan prior to the Michigan Act are the following:

> a) Growers faced the problem of disposing of extremely perishable fruits and vegetables with a corresponding lack of freezing and/or storage facilities.
>
> b) There existed large numbers of unorganized growers who, when aligned against a concentration of processors, could not individually affect the price paid for their product by processors.
>
> c) The market lacked an extensive number of processors and the growers lacked ability to transport perishable goods any distance.
>
> d) Processors were reluctant to recognize voluntary grower cooperative bargaining associations.
>
> e) Processors were known by growers to discriminate against persons who belonged to cooperative bargaining associations. J.S. App. 821.

After reviewing the trial court record the Michigan Supreme Court was persuaded that the processor conduct described in this last finding caused the Michigan Legislature to step in and correct the problem which the Federal Act had not successfully solved. As stated by the Michigan Supreme Court:

> AMABA's exclusive representation provisions insulate the association from handler attacks on its membership by eliminating the possibility of 'sweetheart' offers made to non-association producers, but not the association's membership. Without doubt, if the purpose of a 'sweetheart' offer made to one producer is to coerce another in his choice of association membership, then the handler would be in violation of § 2303(a) of FAFPA. The obvious difficulty in proving such indirect coercion, especially since the justification for a superior offer may rest upon an array of ostensibly sound but often subjective economic factors such as a handler's assessment of quality, is eliminated under an exclusive representation system.
>
> Similarly, AMABA's service fee provisions protect the association's integrity by eliminating the incentive for a producer to be a 'free rider,' accepting the benefits of association representation without assisting in its costs. J.S. App. A15.

The quoted language reflects the Michigan Supreme Court's unanimous recognition that the Michigan Legislature concluded that the "compulsory" aspects of its Act were essential, in view of the ineffectiveness of the Federal Act, to the survival of Michigan agriculture. The Michigan Supreme Court explained that:

> The compulsory aspect of AMABA is secondary but very much germane to its primary permissive-enabling function in that exclusive representation is an additional safeguard to the majority wanting representation by association. In a very real sense requiring representation of the minority permits representation of the majority. J.S. App. A26.

This passage demonstrates the state's clear articulation and affirmative expression of support for the policy of exclusive representation. Moreover, Michigan is involved in the enforcement of its policy of promoting meaningful negotiations between roughly equal bargaining parties since it has established a formal mechanism for resolving violations of the Act and because its statutory standards for resolving disputed terms of trade are as reasonably precise as the subject matter permits. Mich. Comp. Laws §§ 290.704(3)-(6), .720. *Cf. City of Detroit v. Detroit Police Officers Association*, 408 Mich. 410, 458-466, 294 N.W.2d 68 (1980). Moreover, the Michigan Act remedies the central evil addressed by the Federal Act without violating the policies of the Sherman Act.

As contemplated by the Michigan Act the bargaining between the accredited association and various food processors will generally result in the negotiating parties reaching their own base price agreement by reference to supply and demand forces. In the rare case in which the parties do not reach a timely agreement the Michigan Act provides for arbitration of the unresolved contract terms, and the arbitration committee is required to base its decision on the eleven criteria set forth in the statute. Moreover, if a party to the arbitration believes that the arbitration committee's award fails to comport with those criteria then that party has a statutory right (which, to date, no one has found necessary to exercise) to seek review of the award in the Michigan Court of Appeals. Mich. Comp. Laws § 290.723. This is a far cry from the unilateral price-setting by wholesalers found unprotected by the state action shield in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Appellants' preemption arguments fall far short of what is necessary in order to strip Michigan of its right to regulate so as to assure a viable and stable agricultural economy. The challenged regulation is justified, in part, by the same rationale which led this Court to conclude, in the labor context, that a state's interest in labor stability is strong enough to justify the enforcement of a statutorily authorized union security agreement notwithstanding the First Amendment. *See Abood, supra,* 431 U.S. 209.[13] In any event, because the Michigan Act compels the challenged exclusive representation and marketing service fee provisions it follows that the state action defense overcomes Appellants' claim of handler coercion.

V. Neither the Legislative History nor the Language of the Federal Act Supports the Claim That It Creates a Processor Right to Ignore Cooperative Associations of Producers.

Having addressed Appellants' argument that the Michican Act destroys the Federal Act's protection of a farmer's right not to join an association, we now turn to Appellants' assertion that Congress, through 7 U.S.C. § 2304, affirmatively created or protected a processor's right to deal individually with farmers and to ignore farmer cooperatives. After carefully examining Appellants' arguments the Michigan Supreme Court rejected them, concluding that "Section 2304's disclaimer of any Congressional intent to affect pre-existing freedom to deal individually cannot be read as a creation of new rights or an express new statu-

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13. Incidentally, the First Amendment issues of *Abood* are obviated because the Appellee bargaining board has promulgated a rule mandating that marketing service fees "shall not include costs of services to members that do not benefit nonmembers." 1979 Mich. Adm. Code 1391, R. 290.106.

tory protection of old rights; nor can it be read as precluding a state from choosing to adjust pre-existing freedom to deal." J.S. App. A14.

The asserted type of preemption, implied preemption, is not to be lightly presumed. Accordingly the normal cautions regarding the shortcomings of inquiry into legislative motive are particularly applicable. In this context, because of the rule against seeking out conflicts between state and federal regulation where none clearly exists, we submit that it is unproductive to attempt to ascertain the meaning of what Congress did by reference to what opponents of the legislation said during committee hearings.

This Court has observed that "inquiry into congressional motive or purposes are a hazardous matter," *United States v. O'Brien*, 391 U.S. 367, 383 (1968), in part because "[w]hat motivates one legislator to make a speech for a statute is not necessarily what motivates scores of others to enact it." *Id.* at 384. *See also Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 51 U.S.L.W. 4449, 4456 (1983).

In his concurring opinion in *Schwegmann, supra*, Justice Jackson expressed the following view on the use of legislative history as a basis for judicial decision-making:

> [I]t does not appear that there is either necessity or propriety in going back a bit into legislative history.
>
> Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against that rule. But to select casual state-

> ments from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress and one of its important functions. 341 U.S. at 395-396.

Justice Jackson went on to observe that "[t]o accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country." 341 U.S. at 396-397.

If the confusing purpose which Appellants attribute to Congress is accurate one must wonder why the U.S. Department of Agriculture, entrusted with substantial enforcement power under the Federal Act, has not found Appellants' strained meaning in the words of that Act. We have already referred to the undisputed trial testimony which demonstrated the USDA's view that the Michigan Act does not conflict with the Federal Act. *Supra* at 13. Similarly, in U.S. Dep't of Agriculture, *Legal Phases of Farmer Cooperatives* (1976 ed.), the publication of which is an official function of the USDA's Farmer Cooperative Service, the authors succinctly state as follows:

> The Agricultural Fair Practices Act of 1967 protects farmers' rights to organize and join cooperatives. The law establishes standards of fair practices for handlers and processors who deal with farmers. It prohibits them from discriminating against farmers because they are members of a producer's association. *Id.* at 544.

Nevertheless, the heavy reliance by Appellants and amici upon the Federal Act's legislative history warrants some discussion of same in order to place that history in proper perspective. As Senator Aiken, the sponsor of the bill ultimately passed by the Senate, predicted on

May 2, 1967, at the outset of a new segment of Senate subcommittee hearings on S. 109, the bill which he had earlier introduced in 1965:

> S. 109 would put teeth in existing law and those who presently make and control market prices will vigorously oppose it.
>
> They do not want the farmer to have a bargaining position. *Agricultural Producers Marketing Act: Hearings Before the Subcomm. of the Senate Comm. on Agriculture and Forestry*, 90th Cong., 1st Sess. 10 (1967) [hereinafter cited as May 1967 Senate hearings].

Senator Aiken's prediction proved accurate since, in addition to persons whose graphic descriptions of the processor coercion against cooperative membership demonstrated the obvious need for a more effective legal remedy, numerous other individuals testified against the bill.

While speaking in support of the proposed legislation Agriculture Secretary Freeman made the following observation:

> [I]f the expanded play of the market and private decision making is to work fairly and produce the best results for the entire Nation, the bargaining partners must be somewhat comparable in strength. That is not true today. Because he usually acts individually, the farmer has almost no strength at the bargaining table. It is only when the farmers act in concert that the bargaining process can function as intended in our free enterprise system. It is simply too much to expect a fair result to both parties and in the national interest when one party at the bargaining table is so much stronger than the other. May 1967 Senate Hearings 21-22.

Interestingly, Secretary Freeman also made reference to a Michigan study of discrimination by processors against those farmers who wanted to join the Great Lakes Cherry Producers Marketing Cooperative. *Id.* at 19-20. The processor discrimination faced by that cooperative was explored in more detail in the trial herein. See, e.g., R.T. 1007-1019 and Exs. D and E.

The testimony of present counsel for amicus National Food Processors Association identified the processors' fear that the bill was ambiguous enough that it might raise "a substantial question" as to whether "the bill restricts in any way the right of a handler to refuse to deal with a bargaining association." May 1967 Senate Hearings 85. Being assured by the bill's proponents that no such restriction was intended by *that* bill, the processors had no legitimate basis for continuing to fear that the bill might be interpreted as a Wagner Act for agriculture. Yet as the Michigan Supreme Court correctly observed, an explanation of what the Federal Act was not intended to do has no logical nexus with what a state may do in an area left unregulated by Congress. J.S. App. A8.

The statement of Michigan Senator Hart, a co-sponsor of the bill, advocating the right of farmers to organize themselves just as workers had done thirty years before, certainly flies in the face of any claim that Congress clearly intended the Federal Act to deprive states of the right to enact agricultural bargaining statutes. May 1967 Senate Hearings 98.

It is true, as Appellants have noted, that many proponents of the bill preferred its original language over that finally adopted by the Senate. That fact, however, merely demonstrates that the Federal Act, like other legislation, involved certain aspects of compromise. In this instance much of that compromise was based on the un-

founded fears of processor lobbyists as to what the original proposed legislation, which was never intended as a comprehensive bargaining statute, would have accomplished. After the Senate passed S. 109 it proceeded to the House of Representatives where it was referred to the Committee on Agriculture, which held hearings in September 1967. Some farmer representatives were troubled by certain of the Senate's language changes which might be read, notwithstanding the admitted lack of any evidence of any abuses by farmer associations *against* farmers, as protecting farmers from their own associations as well as from unfair practices by processors and other buyers. Other farmer representatives recognized, however, that the need for a viable remedy for processor discrimination was so strong as to warrant support of a bill which was a step in the right direction and which the Congress would enact, as distinguished from a "perfect" bill which Congress might not enact. As an example, M. R. Garstang, General Counsel of the National Milk Producers Federation, stated his preference for the original language in the bill, but he recognized that the bill passed by the Senate was a compromise and noted as follows:

> I believe most of the protections that were originally in it are still there. I think a lot of things are written into the Senate bill which aren't necessary and which are designed to lay at rest some ghosts which people were seeing. *Discrimination Against Members of Farmer Cooperatives: Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agricultural and Forestry*, 89th Cong., 2nd Sess. 87 (1966).

Near the end of the House Committee Hearing Congressman Foley asked present counsel for amicus National Food Processors Association whether he felt there was substantial evidence of intimidation compelling individual pro-

ducers to join producer organizations. The answer received was that there was no such evidence, either in the Senate or House hearings, although the witness noted that, "I did point out that there have been in the past instances of coercive action by associations." *Id.* at 141. The reference to the past instances of coercive association practices is apparently a reference to an earlier hearing before the Senate subcommittee held in September of 1966. There Edward Dunkelberger, in asking for language that would protect farmers in the exercise of their right not to join associations, referred to "numerous cases in which State and Federal courts have found that bargaining associations have engaged in coercion, fraud, and even physical violence or threats thereof to force producers to join the association or to refuse to deal with processors who will not deal with the association." *Id.* at 195. This testimony appears to be the only definition of the type of association coercion the Congress had in mind when it passed the Federal Act. Because the Michigan Act's exclusive representation and service fee requirements do not constitute such association coercion, fraud, or physical violence, the Federal Act does not preempt the Michigan Act.

Because of the witnesses' divergent views as to the need for, and effect of, federal legislation, further reference to the Senate and House hearings would be unwarranted and unhelpful. Keeping in mind Justice Jackson's caveat that "we should not go beyond committee reports" we turn now to a brief discussion of same. The Senate Committee Report, which recommended passage of the bill, makes reference to the limited function of the disclaimer section (7 U.S.C. § 2304) of the bill by noting, under the heading "Committee Consideration," that the amended bill "makes it clear that normal and proper dealings not designed to restrict the producer's freedom of choice *are not prohibited.*" S. Rep. 474, 90th Cong., *reprinted in* 1968

U.S. Code Cong. & Ad. News 1867, 1968 (emphasis added). As noted in Section 5 of the section-by-section explanation, 7 U.S.C. § 2304 "disclaims any intent to prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in an association of producers, or to prevent handlers and producers from dealing with one another individually on a direct basis, or to require a handler to deal with an association of producers." *Id.* at 1873. The Senate Committee explained that "the bill does not prevent or require these actions and is not intended to do so," yet "while the proponents of the bill stated in their testimony that this was not their purpose, there was some concern, especially on the part of processors and other purchasers of agricultural products, that the bill in fact went further than intended." *Id.* Thus, while the committee put to rest processors' fears, however unfounded, that the Act was a "duty to bargain" law, the committee also concluded its discussion of the disclaimer section by stating:

> While the bill does not require a handler to deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right. *The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves respect and recognition by the handler of agricultural products.* *Id.* (emphasis added).

Amazingly, amicus National Food Processors Association, notwithstanding the efforts of its predecessor, the National Canners Association, to make it clear that the Act did not *create* a "duty to bargain," now dramatically expands the effect of such efforts and contends that this section created an affirmative processor right to refuse to

bargain with producer associations and also deprived states of their inherent right to regulate agriculture. Moreover, it contends that no farmer can decide whether to join a producer association without running the substantial risk of forcing that farmer's regular buyer to look elsewhere for raw products. Brief for National Food Processors Association 24-25. It is hard to imagine a conclusion more in conflict with the Senate Report's final sentence concerning the Section 2304 disclaimer, quoted above, which recognizes the clear fact that an association of producers "deserves respect and recognition by" such processors.

The Senate Committee Report notes that it "did not have before it any testimony to indicate that producers were being subjected to any improper pressure to join associations," and explained that it was only because of the "logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction." *Id.* at 1871. Because no responsible association could condone fraud or violence to coerce independent farmers to join producer associations, the Federal Act's prohibition of this narrow aspect of handler discrimination is understandable. To equate that concept with a clear Congressional deprivation of a state's right to regulate agricultural bargaining, however, is to turn the Federal Act on its head.

Contrary to Appellants' suggestion that the original bill's objectives were not carried out by the final legislative product, the House Committee Report, prepared after the Senate passed S. 109, states in pertinent part that "This legislation is necessary in order to give farmers and their marketing associations new and greater 'market power' " and "Our whole food supply will be endangered if we do not restore to agriculture prices which will enable farmers to stay in business and produce abundantly." H.R.

Rep. 824, 90th Cong., 1st Sess. 1-2 (1967). In its summary of the bill the report states that Section 2305 "makes clear that existing State law is unaffected by this legislation." *Id.* at 3. Under the heading "Committee Action" the committee explained as follows:

> The longstanding policy of the committee and the Congress to promote and support the growth and strength of farmer cooperatives was manifested by the deletion from the Senate bill of the language which many witnesses felt might encourage farmers "not to join" cooperatives. *Id.* at 3.

The House Committee explained that its "amendments to S. 109 were designed to give producers and their associations a more favorable position than that which they held under the bill as it passed the Senate. . . ." *Id.* at 5. Perhaps most effectively disposing of Appellants' assertion that Section 2304, the disclaimer section, creates rights, the House Committee Report noted the importance to processors of clarification that the Federal Act itself did not create a *duty* on the part of processors to bargain. The Committee explained that it was "cognizant of the importance of this section to handlers and felt that *since the scope of the bill embraced only the prohibited acts* in [Section 2303], the language of [Section 2304] should remain substantially as it was approved by the Senate." *Id.* (emphasis added).

Thus, the statutory language and its history plainly reveal that 7 U.S.C. § 2304 is nothing more than an explanation of what the statute does *not* do. Appellants' contrary argument is even weaker than the contention which this Court rejected in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 at 131-132 (1978), as follows:

> The proviso in § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, is merely an exception to that statute's broad prohibition against discriminatory pricing. It created no new federal right; quite the contrary, it defined a specific, limited defense . . . .
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> [I]t is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion. This Court is generally reluctant to infer pre-emption, see, e.g., *De Canas v. Bica*, 424 U.S. 351, 357-358 n.5; *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127, and it would be particularly inappropriate to do so in this case because the basic purposes of the state statute and the Robinson-Patman Act are similar.

These principles apply as well in the present case.

Notwithstanding his incorrect reading of 7 U.S.C. § 2303, the Solicitor General understandably cannot join Appellants' contention that 7 U.S.C. § 2304 creates or protects a processor's right to deal with the individual farmer of his choice, recognizing that "if handlers can insist on dealing directly even with producers who have voluntarily appointed an association as their designated agent, it may be doubted whether the protections of the AFPA are in fact meaningful." Solicitor General Br. 23. The Solicitor General notes that a different (and exceedingly narrow) question is presented in cases such as *Butz v. Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974), wherein a handler has a preexisting contract with a producer and where there is no state duty to bargain law. Solicitor General Br. 24, n.20. Similarly, the Michigan Supreme Court read *Butz*

as a case in which the handler was found in violation of the Federal Act because the handler's refusal to deal with the producer involved had a coercive effect on the producer's choice of whether to join an association. J.S. App. A16.

Appellants' attempt to read *Butz* as supporting their preemption argument is based solely on that portion of *Butz* which attempted to interpret 7 U.S.C. § 2304. The *Butz* Court *held*, however, that the defendant processor's actions were not protected by § 2304 and the Court expressly declared its analysis of that section to be *dicta*. 386 F. Supp. at 238. The abundant discussion in *Butz* of the purposes and intent of the Congress in enacting the Federal Act does not support Appellants' preemption claim. In its analysis of the legislative history of that Act the *Butz* Court significantly states that:

> The overriding purpose of Congress in enacting the [Federal Act] was to protect the individual producer of milk in his right to band together with other producers or, in effect, to unionize . . . . 386 F. Supp. at 235.

There can be no "collision" between Federal and Michigan Acts since the foregoing "overriding" Congressional purpose is precisely the same purpose sought to be achieved by the Michigan Act. See *Kesler v. Department of Public Safety*, 369 U.S. 153, 172 (1962).

The *Butz* Court characterized the legislative history of the Federal Act as one fraught with confusion and ambiguity. The Court in *Butz* stated that the Act:

> in its final form is a creature of conflicting intent and is, as a result, fraught with seemingly inconsistent and paradoxical provisions. 386 F. Supp. at 234-235.

Appellants' contention that Congress has, by enacting this "paradoxical" legislation, preempted state legislation is indefensible. The unexpressed purpose of Congress to set aside state legislation "is not lightly to be inferred . . . where the legislative command, read in the light of its history, remains ambiguous." *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 275 (1942).

Statements made by supporters of the bill at the time of its passage by the House fail to support Appellants' contention that Congress thought it was enacting a processor rights bill that would deprive states of their right to assure that farmers could collectively bargain with processors. Representative Sisk, a key proponent, explained to the House that the purpose of the bill:

> Is to strengthen the competitive marketing system for agricultural commodities by creating several new legal remedies designed to prohibit certain unfair trade practices. Legislation is necessary in order to give farmers and their marketing associations new and greater 'market power.' 114 Cong. Rec. at 7449 (1968).

Representative May noted to her colleagues that:

> The bill before us today is the product of several years of effort directed at the objective of trying to strengthen, in one way we have within our power to do so, the bargaining power of the U.S. farmer.
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> I think I might say to my colleagues who are more familiar with labor union oriented language than they are with agricultural language that this attempts to outlaw 'yellow dog contracts.' 114 Cong. Rec. at 7456 (1968).

Representative Scherle, another supporter of the bill, noted that he was "pleased that this body has the opportunity to consider the question of providing a proper atmosphere for the exercise of bargaining rights by agricultural producers." 114 Cong. Rec. at 7459 (1968).

Representative Scott summarized the effect of the legislation as follows:

> I believe this bill accomplishes a very desirable objective; namely, to strengthen the right of farmers to band together in marketing cooperatives to increase their bargaining power. 114 Cong. Rec. at 7460 (1968).

Finally, as explained by Representative Sisk shortly before the House voted on the bill, the disclaimer section, Section 2304, "says what the bill is not intended to do. Its purpose was to say what the bill did not intend to do and thereby allay the fears of some of its opponents." 114 Cong. Rec. at 7465 (1968).

In view of the foregoing it is only by manifestly ignoring the will of Congress that one can accept the Appellants' argument that the disclaimer section creates a processor right to ignore cooperative associations of producers. Moreover, the effect of such cavalier treatment of states' rights would be felt far beyond Michigan. Since the enactment of the Federal Act several states in addition to Michigan have passed agricultural bargaining laws.[14] While those statutes do not contain Michigan's exclusive representation provision, their central "duty to bargain" provisions would be destroyed by a holding that

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14. *See, e.g.*, the Minnesota Agricultural Marketing and Bargaining Act of 1973, Minn. Stat. Ann. §§ 17.691-17.701 (West 1981); and the Maine Agricultural Marketing and Bargaining Act, Me. Rev. Stat. Ann. Tit. 13 §§ 1953-1965 (1973).

processors enjoy an absolute right to refuse to deal with cooperatives.

Such a holding would have to ignore the following aspect of Justice Brennan's concurring opinion in *National Broiler Marketing Association v. United States*, 436 U.S. 816, 837-8 (1978):

> [T]here is persuasive evidence that Congress' concern for protecting contract growers vis-a-vis processors and handlers has not abated. In 1968, Congress enacted the Agricultural Fair Practices Act of 1967, 82 Stat. 93, 7 U.S.C. §§ 2301, et seq. (1976 ed) designed to protect the 'bargaining position' of 'individual farmers' by prohibiting 'handlers' from interfering with 'producers' ' right 'to join together voluntarily in cooperative organizations as authorized by law.'

Moreover, to find such a powerful processor right in the Federal Act would squarely conflict with the following observation of the court in *Fairdale Farms v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980):

> As late as 1968, with the enactment of the Agricultural Fair Practices Act, Congress continued to recognize the need for stronger and more effective marketing and bargaining associations for farmers. *Id.* at 1042 (citations omitted).

Appellants' preemption argument must fail unless this Court accepts the most doubtful of propositions: that when Congress attempted to outlaw processor discrimination against those farmers who tried to organize for collective strength, Congress unwittingly granted processors the absolute right to ignore farmer associations. Such a conclusion, we submit, makes a mockery of the legislative branch.

CONCLUSION

For the reasons set forth above, the decision of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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